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OCT 18 1982
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No. 82-402

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, Deceased - - - Appellant

versus

CITY OF LOUISVILLE, et al. - - - Appellees

On Appeal from Kentucky Court of Appeals

MOTION TO DISMISS APPEAL, AND, ALTERNATIVELY, MOTION TO AFFIRM

FRANK X. QUICKERT, JR.
Director of Law
200 City Hall
Louisville, Kentucky 40202
Counsel for City of Louisville

ALEX F. TALBOTT
900 Fiscal Court Building
Louisville, Kentucky 40202
Counsel for Louisville & Jefferson County Planning Commission

WALTER R. BUTT, III
312 City Hall
Louisville, Kentucky 40202
Counsel for Louisville Board of Aldermen

WESTERFIELD-BONTZ CO., 610 W. KENTUCKY - P. O. BOX 2681, LOUISVILLE, KY.

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IN THE

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October Term, 1982

No. 82-402

ROBERT L. DURNING, Trustee of Estate of R. L. Durning, Deceased - - *Appellant*

v.

CITY OF LOUISVILLE, et al. - - - *Appellees*

ON APPEAL FROM KENTUCKY COURT OF APPEALS

MOTION TO DISMISS APPEAL PURSUANT TO RULE 16 OF RULES OF SUPREME COURT, AND, ALTERNATIVELY, MOTION TO AFFIRM DECISION OF KENTUCKY COURT OF APPEALS

May it please the Court:

Appellees, City of Louisville, Kentucky, the Board of Aldermen of the City of Louisville, and the Louisville and Jefferson County Planning Commission, pursuant to Rule 16 of the Rules of the Supreme Court move this Court to dismiss the appeal herein, and alternatively, to affirm the judgment of the Court of Appeals of the Commonwealth of Kentucky, on the grounds that the questions on which the decision of the cause depends are so unsubstantial and the decision below so plainly correct as not to warrant further argument. There are no substantive federal ques-

tions to be decided, and the case was properly and adequately decided on a non-federal basis.

ADDITIONAL STATEMENT OF THE CASE

Contrary to Appellant's hyperbolic version of the case as presented in the Jurisdictional Statement, this cause involves nothing more than a challenge to the validity of a zoning ordinance of the City of Louisville as applied to Appellant's property. Acting on the favorable recommendation of the Louisville and Jefferson County Planning Commission, the Louisville Board of Aldermen unanimously adopted an ordinance rezoning Appellant's property from R-7 Apartment to R-5A Apartment following the massively destructive tornado of April, 1974.

The Jefferson Circuit Court and the Kentucky Court of Appeals affirmed and upheld the decision of the Board of Aldermen. The Kentucky Supreme Court refused to take discretionary review of the case.

Appellant has taken one of Louisville's proudest stories—the recovery and reconstruction following a massively destructive tornado—and has artfully contrived from it a lengthy diatribe alleging covert fraud and conspiracy involving hundreds of people, all directed at him. To attempt to even partially rebut, explain or justify the skillfully selected statements Appellant has assembled in order to conjure up the conspiracy against him would require a brief the size of a Dostoevski novel.

The rezoning of Appellant's property, along with hundreds of others in the City of Louisville, was initiated as a result of the April 3, 1974 tornado. The tornado cut a wide path of destruction in the area in which the Appellant's property was located. This destruction had a substantial impact on the physical nature of the affected areas, and threatened the social and economic stability of the surrounding neighborhoods.

The basic character of the affected neighborhoods at the time of the tornado was single family residential, but the zoning maps and the mapped portion of the Comprehensive Plan permitted the development of high-density apartments. Prior to the tornado, this type of development was unlikely since the areas had fully developed into stable, predominantly single-family residential neighborhoods.

After the tornado's devastation, owners of the properties in those neighborhoods affected by the tornado were faced with the decision of rebuilding their residences or selling their property. The uncertainty as to the redevelopment which would occur in the tornado-damaged neighborhoods was a matter of great concern to those residents as well as to others whose properties were not directly affected by the tornado. This concern was vocalized by various neighborhood groups and concerned citizens in the affected areas. The mayor of the City and the Board of Aldermen requested that the Planning Commission study the areas affected by the tornado, re-evaluate the property of the then-existing zoning in light of present circumstances, and make recommendations to the Board of

Aldermen and to the City of Louisville as to possible charges in zoning.

The Planning Commission's evaluation of the affected areas which was published in the *Post Tornado Planning Report* evaluated: 1) the population growth and the demography of the affected area and the city in general, 2) the existing land use pattern of the surrounding area including the zoning classification, and 3) the potential impact of any redevelopment of the areas in light of the principles and goals of the community's comprehensive plan.

The findings of the report were that the existing character of the land use which had developed was not compatible with the zoning which was authorized; that the residential neighborhoods which had developed were sound and viable and that, therefore, the high density development which was permitted in the area by the existing zoning classification would be adverse to the best interest of the public welfare and contrary to the following principle of the comprehensive plan:

> EXISTING SOUND RESIDENTIAL AREAS — NEIGHBORHOODS — SHOULD BE CONSERVED, AND DETERIORATED RESIDENTIAL AREAS WITH REDEEMING QUALITIES SHOULD BE REGENERATED. Residential Planning Principle No. 5, Louisville & Jefferson County Comprehensive Plan (1971).

The applicability of the Report's findings to the Durning property is clearly demonstrated by the maps accompanying the report which related to that prop-

erty and which have been included in the appendix to this brief.

The Durning Tract is the isolated R-7 multi-family parcel identified by Map 21 (Appendix A), located in an area zoned almost entirely R-5 single family residential. Map 5 (Appendix B) indicates that the area has developed predominantly with single family residences although there are some dwellings which have been converted into duplexes and apartments.

The Durning Tract is a large vacant parcel located at the end of narrow, poorly maintained streets which were identified by Map 15 (Appendix C) as having circulation constraints. The pavement of each of these streets dead ends at the Appellant's property. There is no access from the tract to a major arterial without first travelling through the single family development and then crossing a series of railroad tracks.

Map 9 (Appendix D) indicates that there were numerous residences with minor damage near the Durning Tract, two structures with major damage and three structures with serious damage. The Durning Tract was, as the Report concluded, clearly inappropriate for high density multi-family development and the potential for such development threatened the reconstruction efforts of the damaged properties.

The Planning Commission, after reviewing the report and upon a concurring recommendation from its site inspection committee which made several trips to the affected areas, held a special public hearing on January 25, 1975 to review arguments for and against the proposed change in zoning. The Appellant, as a

property owner of the vacant lot zoned high density in one of the areas recommended for rezoning, was present at that meeting and his arguments against the zoning change were presented by his attorney.

After the public hearing, the Planning Commission was divided on the rezoning issue and was unable to recommend approval or disapproval. The division continued through several subsequent meetings in which the issue was reconsidered.

The deadlock was resolved on April 3, 1975, when the Mayor of Louisville, an ex-officio member of the Planning Commission pursuant to Kentucky Revised Statutes (KRS) 100.137, attended a regularly scheduled commission meeting and voted in favor of recommending approval of the rezoning. The proposal was then forwarded to the Board of Aldermen, the legislative body with final authority for proposed zoning amendments. The Aldermen unanimously voted to adopt the ordinance rezoning the property.

The Appellant sought judicial review of the Board's decision by filing an action in the Jefferson Circuit Court pursuant to KRS 100.347. The constitutionally mandated *limited* judicial review of zoning decisions was quickly abandoned in an orgy of discovery in which the Appellant sought to search the records of agencies, public officials, legislators, executive and judicial officers, employees and attorneys for the defendants. The Appellant also sought to depose numerous elected and appointed government officials, employees of governmental agencies and many concerned citizens

involved in the proceedings before the Board and Commission.

Despite strenuous objections that the discovery exceeded the legitimate scope of review, that it was unduly burdensome and that it was unconstitutional, the trial court sustained the Appellant's every motion to compel discovery. The trial court also authorized liberal exceptions to the limitations on discovery by written interrogatories and requests for admissions.

The abuse of discovery allowed in this case created a mountainous record which required over sixteen months from the date of submission until the trial court entered its opinion, conclusions, findings of fact and order dismissing the Appellant's complaint. The Appellant now charges the Appeals Court with error because it was not persuaded by the mountainous record that any wrong-doing had occurred.

Placed in proper perspective, the facts relied upon by the Appellant are not sufficient to overturn the legitimate legislative action which is the subject of this appeal. The trial court properly found that "the facts do not support a finding of fraud or arbitrariness."

ARGUMENT

A.

The Federal Questions Raised on Appeal Are Not Substantial

Appellant, of course, asserts that the questions of alleged federal interest which he has presented in his Jurisdictional Statement are substantial and urges review by the United States Supreme Court. Appel-

lees respectfully disagree and pray this honorable court to dismiss the appeal and to affirm the judgment of Kentucky Court of Appeals.

Appellees submit that the questions presented are not substantial and do not merit further review by this court. Substantiality of a federal question is a somewhat illusive concept that is not amenable to general description. However, one pertinent indicia of a federal question that is not substantial is that the question of federal law is well settled. See, e.g., *Zucht* v. *King*, 260 U. S. 174 (1922). Appellees submit that the jurisprudence of zoning is well-settled by the opinions of this court, and that there is no substantial federal question presented for review in this matter.

The constitutional law of police power regulation over the use of land is well-established. In *Village of Euclid* v. *Ambler Realty Corp.*, 272 U. S. 359, 387-88 (1926), this court set out an enduring rule of law:

> [Zoning regulations] must find their justification in some aspect of the police power asserted for the public welfare.

The court in that opinion also stated that "if the validity of the legislative classification be fairly debatable, the legislative judgment must be allowed to control."

In a recent case, *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980), this court again stated what is generally recognized as the accepted standard:

> The application of a general zoning law to particular property effects a taking if the ordinance does

> not substantially advance legitimate state interests, see *Nectow* v. *City of Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transportation Corp.* v. *New York City*, 438 U. S. 104, 138, n. 36 (1978).

In another recent case, *Schad* v. *Borough of Mt. Ephraim*, 452 U. S. 61 (1981), this court confirmed the established character of the constitutional principles of zoning law:

> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control/and use and have sustained the regulations if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.

The principles of constitutional law controlling the exercise of zoning power are clear, unambiguous and consistent. These established principles of law and constitutional issues of due process, appropriately applied to this case by the Jefferson Circuit Court, the Kentucky Court of Appeals and the Kentucky Supreme Court (which denied discretionary review of the case). The Appellant's Jurisdictional Statement does nothing more than challenge the factual determinations made by the courts of the Commonwealth of Kentucky. These fact and evidence questions are not "substantial federal questions" under the appellate jurisdiction of the United States Supreme Court. No matter how unhappy appellant is with the unanimous decisions of

Kentucky's Trial and Appeals Courts on this case, and no matter how bitter the language, the Jurisdictional Statement simply does not raise any substantial question of federal law.

The Jefferson Circuit Court and the Kentucky Court of Appeals properly resolved the merits of this litigation on the basis of state law governing zoning cases in Kentucky. The trial court and the Court of Appeals found no violation of Kentucky's strict due process requirements for zoning cases, nor any conspiracy or fraud which would be a basis to overturn the decision of the legislative body.

The Court of Appeals found "no arbitrariness or reversible error;" found that the Planning Commission used a "reasonably fair and complete fact-finding procedure;" and found "no failure to comply with the statutes" governing zoning changes.

The trial court opinion, which was adopted *in toto* by the Court of Appeals, dealt with the chronology of events leading to the re-zoning, and measured the activities of the planning and legislative bodies against the procedural, due-process and statutory standards of Kentucky law. The decision of Louisville's legislative body has been upheld at every level of judicial review.

The Appellant has filed over 185 pages of written legal arguments in support of his position in the state courts. Despite his extravagant claims that his constitutional rights were violated, we can find only three references in the entire 185 pages to prior decisions of the United States Supreme Court to support his position. One was the 1901 *Cotting* v. *Godard*, 183 U. S.

79 (1901) decision buried on page 55 of his tendered findings of fact. Another was a vague reference to *U. S.* v. *Nixon,* 418 U. S. 683 (1974) which was cited for the proposition that no man is above the law—a proposition that is axiomatic but which bears little resemblance to the rest of the case. And finally, Appellant cited *McNabb* v. *U. S.,* 318 U. S. 332 (1942) for a quote about the "history of liberty." The almost complete failure to support the allegations of unconstitutionality with federal court citations and authority is reflective of their lack of substantiality.

B.

The Decisions of the Kentucky Courts Rest on an Adequate Non-federal Basis

The only manner in which the Appellant is able to raise even the semblance of a federal constitutional issue is by reciting a version of the facts which has never been accepted by any other party or any other court. The United States Supreme Court cannot act as a trier of fact on this appeal. The United States Supreme Court is therefore bound by the findings made by the trial court unless those findings are shown to be clearly in error, and no such allegation has even been made. Therefore, the decisions of the state courts rest upon a non-federal basis, namely, the conclusiveness of the findings of the trial court which raise no federal issue and, which preclude the movant's attempt to raise federal issues based on a different factual situation.

C.

Appellant Failed to Raise Any Constitutional Issues in a Timely Manner

The Appellant, Robert L. Durning, Jr., is himself a lawyer. In addition he was represented throughout the proceedings before the Louisville and Jefferson County Planning Commission and the Board of Aldermen of the City of Louisville by an attorney who is considered an expert in zoning matters. At no time during those proceedings did the Appellant or his attorney object to the procedures that were being followed. The Appellant was given the notice required by Kentucky statutes; a complete public hearing was held in which his attorney fully presented his views; the Planning Commission made extensive written findings based on the record; none of the decision-makers were shown to have any misunderstandings about the facts involved; and despite an extensive investigation by the Appellant, there was developed not a single shred of direct evidence of any fraud, misconduct or improper motivation. The Movant's very belated claim that he was somehow denied substantive and procedural due process and equal protection of the laws came too late even in the state courts to be given serious consideration.

D.

Appeals Jurisdiction Pursuant to 28 U.S.C. 1257(2) Is Inappropriate in This Case

To call this appeal an attack on an ordinance of the City of Louisville as being unconstitutional is accurate only in the most technical sense. However, this case clearly is not of the type over which Congress intended to grant appeal jurisdiction pursuant to 28 U.S.C. 1257 (2).

The Appellant is not claiming that the city's zoning ordinances which have general application throughout the city are unconstitutional. He is claiming that it is unconstitutional only as to his property; i.e., less than 3 acres located at the end of 3 poorly built deadend roads. It is an attack on an ordinance only because the re-zoning of his property was accomplished by an amendment to the general, city-wide zoning ordinance —an area-wide re-zoning based on a year-long study of the after-effects of the April, 1974 tornado. This litigation, therefore, is unlikely to have any substantial effect upon anyone in the City of Louisville or outside the City of Louisville, except the Appellant. There are no sound public policy reasons for continuing with this litigation, and, surely, no basis in the federal law for going on with it.

CONCLUSION

The appeal filed herein does not come within the meaning and intent of 28 U.S.C. 1257(2) and it should be dismissed for the reasons set out above.

Respectfully submitted,

FRANK X. QUICKERT, JR.
200 City Hall
Louisville, Kentucky 40202

Counsel for the City of Louisville

WALTER R. BUTT, III
312 City Hall
Louisville, Kentucky 40202

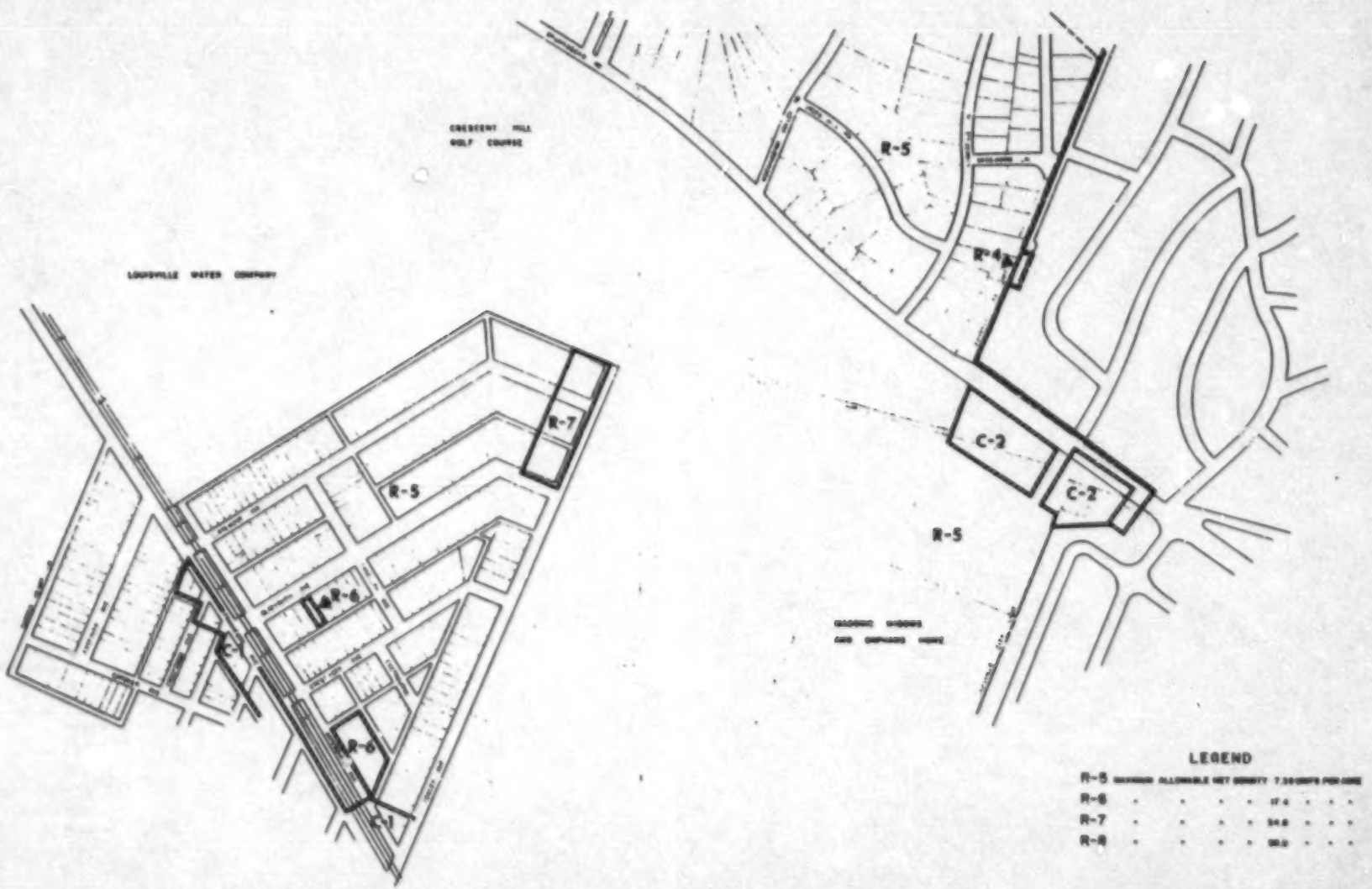
Counsel for Louisville Board of Aldermen

ALEX F. TALBOTT
900 Fiscal Court Building
Louisville, Kentucky 40202

Counsel for Louisville and Jefferson County Planning Commission

APPENDIX

APPENDIX A



POST-TORNADO NEIGHBORHOOD STUDY

EXISTING ZONING DISTRICTS

NORTHEAST CRESCENT HILL

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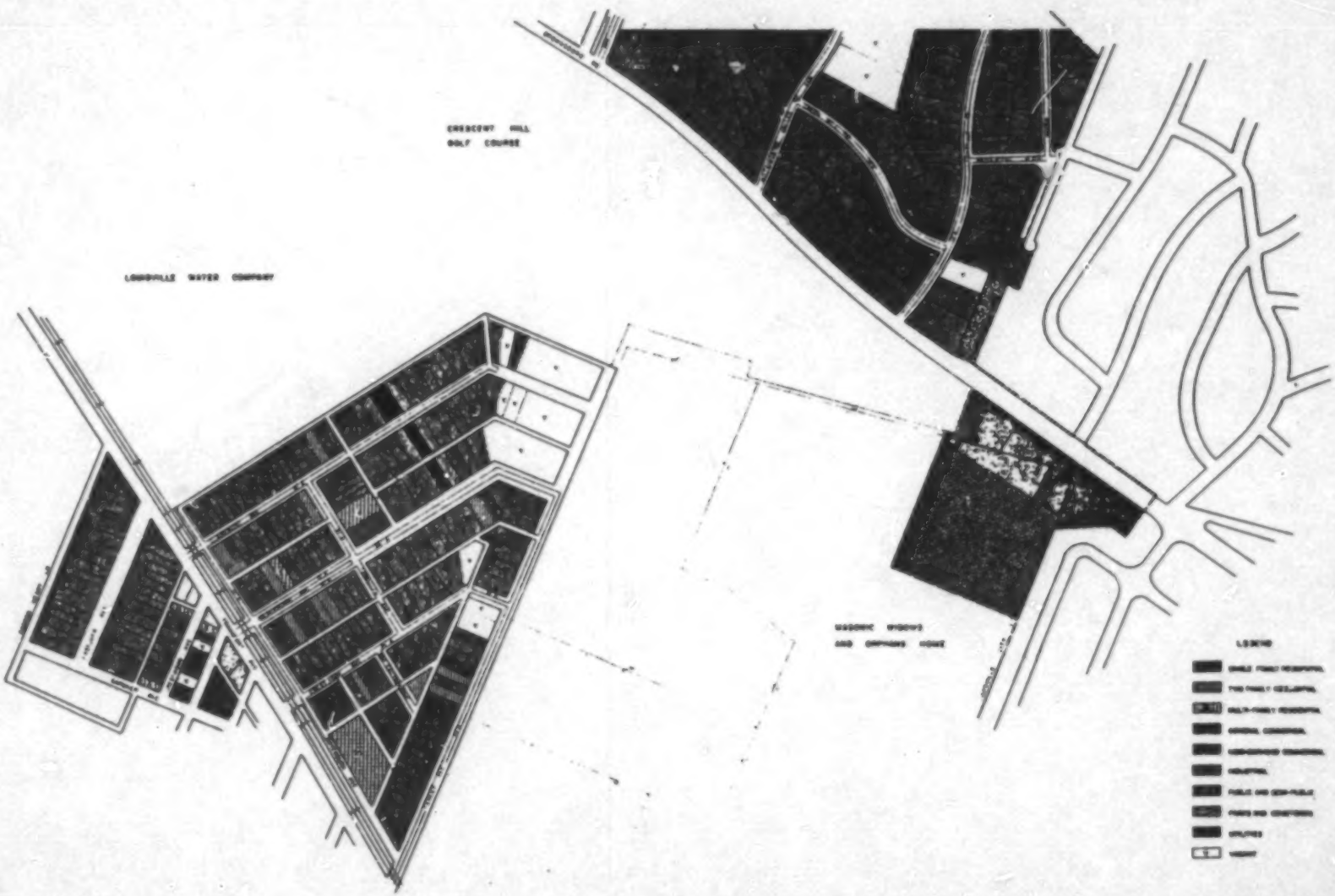
APPENDIX B



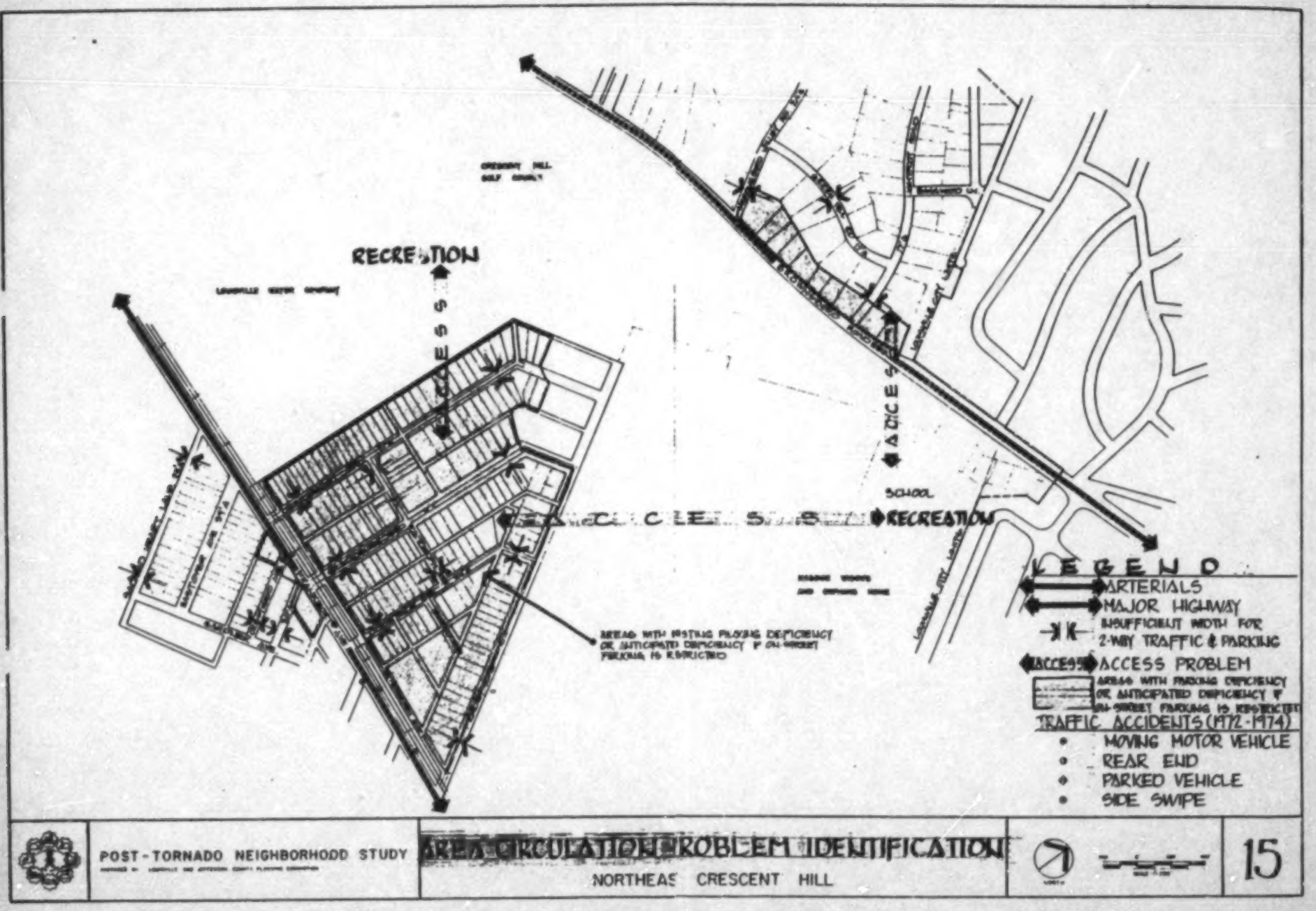
POST-TORNADO NEIGHBORHOOD STUDY

LAND USE

NORTHEAST CRESCENT HILL

5

APPENDIX C



POST-TORNADO NEIGHBORHOOD STUDY

AREA CIRCULATION PROBLEM IDENTIFICATION

NORTHEAS CRESCENT HILL

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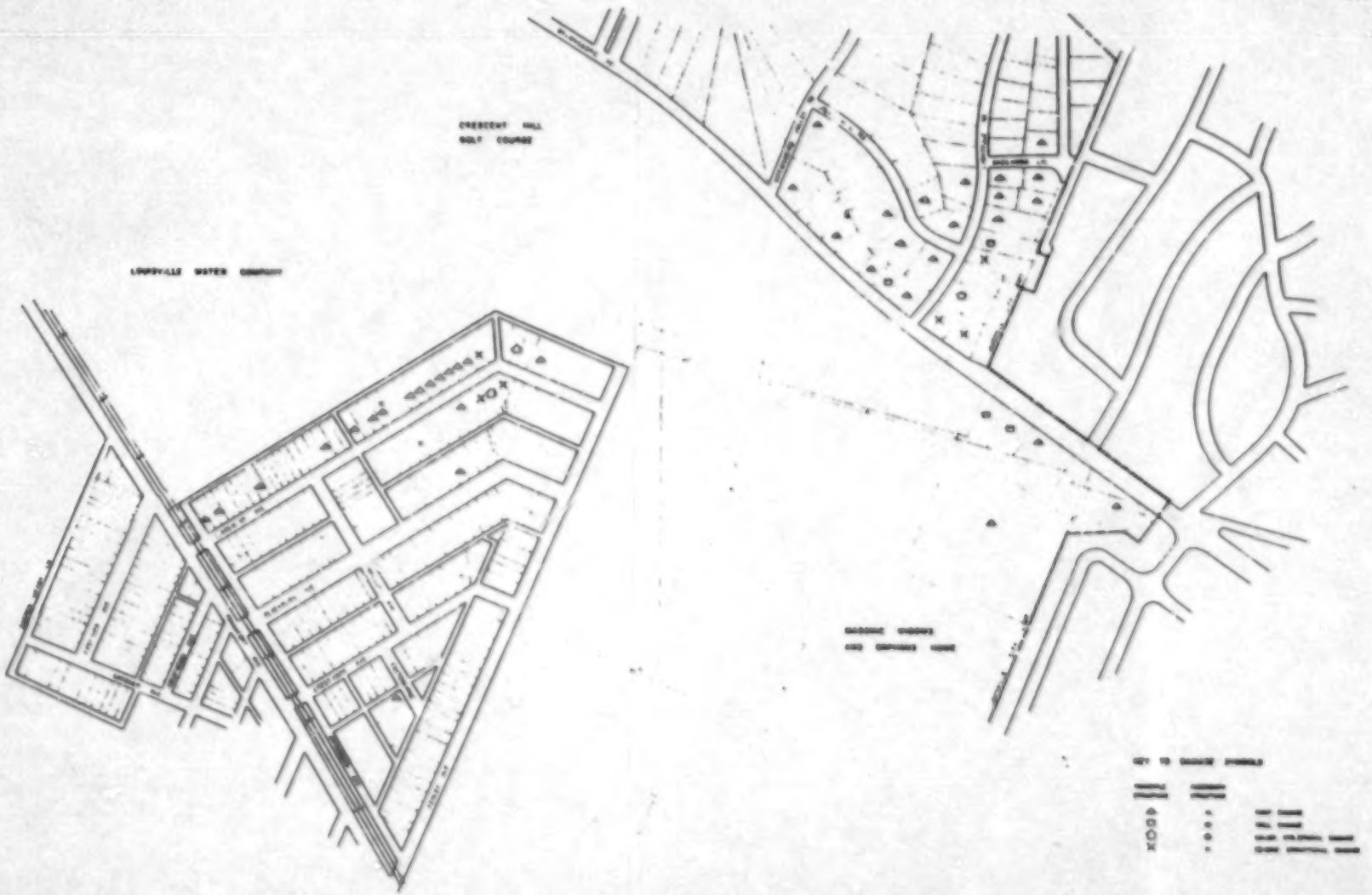
APPENDIX D



POST-TORNADO NEIGHBORHOOD STUDY

STRUCTURAL DAMAGE

NORTHEAST CRESCENT HILL

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CERTIFICATE OF SERVICE

I, Alex F. Talbott, one of the attorneys for appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on October 6, 1982, I served three copies of the Motion to Dismiss Appeal on the several parties to this appeal separately represented by mailing such copies in duly addressed envelopes, first class postage prepaid, to each of the following attorneys of record at the designated post office address:

Gerald Kirven
Attorney for Appellant
501 South Second Street
Louisville, Kentucky 40202

Kyle T. Hubbard
Attorney for Appellant
730 West Main Street
Louisville, Kentucky 40202

Also I mailed three copies to:

The Hon. Steven L. Beshear
Attorney General of the
Commonwealth of Kentucky
Capitol Building, Room 116
Frankfort, Kentucky 40601

All parties required to be served have been served.

Alex F. Talbott

ALEX F. TALBOTT
900 Fiscal Court Bldg.
Louisville, Kentucky 40202
(502) 581-6230

Counsel for Louisville and and Jefferson County Planning Commission